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IN THE

Supreme Court of the United States

No. .....

SOUTHGATE NELSON CORPORATION,
Petitioner,

vs.

ELIZABETH J. QUINN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Southgate Nelson Corporation, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit (R. 116) entered on the 18th day of July, 1941, affirming the judgment of the District Court for the Southern District of New York (R. 102-103).

Petitioner respectfully shows as follows:

Jurisdiction.

The order for mandate below was entered on July 18th, 1941 (R. 116).

The jurisdiction of this Court is provided by Title 28 U. S. Code, Section 347(a).

Opinions Below.

The opinion of District Judge Moscowitz (R. 93) is reported in 36 Fed. Supp. 873 and that of the Circuit Court of Appeals (R. 112) in 121 Fed. (2d) 190.

Question Presented.

This case involves the question of whether an agent is liable under the doctrine of *respondeat superior* for the torts of subagents in which it did not participate when such subagents were appointed and paid by the principal and were engaged in the principal's business.

Statement.

The petitioner, a Virginia corporation, entered into a contract with the United States Maritime Commission whereby it agreed to act as its Managing Agent for certain vessels owned by the Maritime Commission, including among others the *S. S. Waukegan*. The *S. S. Waukegan* on January 10, 1939, while proceeding through the Chesapeake & Delaware Canal, collided with the bridge over said Canal at St. Georges, Delaware and as a result of that collision respondent's intestate was instantly killed. The District Court found that the collision was due to the negligence of the master or other officers of the *Waukegan*. This finding was affirmed by the Circuit Court of Appeals.

No negligence other than that of the officers and crew of the *Waukegan* was found by either Court below and no other negligence was claimed by the respondent.

The contract between the petitioner and the Maritime Commission makes it clear that the *Waukegan* was operated for the account of the Maritime Commission. The contract provides:

"3. *Allocation of Vessels.* The Owner hereby allocates the vessels above named to the Managing Agent for management and operation under this agreement. * * *

* * * * * *

"6. *Conduct of Business of the Line.* The vessels shall be used only for the carriage of lawful merchandise and passengers. All business shall be carried on in the name of the Line for the account of the Owner. The Managing Agent shall, as directed by the Owner, collect all monies and shall certify or approve for payment by the Owner, vouchers covering all expenses incident to the management and operation of the Line, the maintenance and operation of the vessels, and all other business activities pertaining thereto. The Managing Agent shall account to the Owner for all monies collected by it or its subagents or monies disbursed by its subagents. The Managing Agent agrees to continue to book cargo for the vessels of the Line for voyages beyond the termination of this agreement, provided that all such commitments shall be subject to such instructions as may be issued by the Owner.

"7. *Managing Agent to Man, Supply and Operate.* The Managing Agent agrees to man, equip, victual, supply and operate the vessels, subject to such restrictions and in such manner as the Owner may prescribe, and to certify or approve for payment by the Owner the true cost thereof and all other costs and expenses, except overhead, incident to the management, operation and conduct of business of the vessels as the Owner may from time to time direct. The Licensed Officers and Chief Steward, however, are to be subject to the approval of the Owner, and the Owner shall have the right to require the removal of any of such employees if it shall have reason to be dissatisfied.

* * * * * *

> "19. *Payment of Overhead.* The Owner agrees to pay to the Managing Agent the actual overhead expenses of the Managing Agent determined by the Owner to have been fairly and reasonably incurred and to be properly applicable to the management and operation of the Commission's vessels under this agreement. * * *"

In actual practice the master and officers were appointed by the Maritime Commission and were paid by the Maritime Commission. All the operating expenses were paid directly by the Maritime Commission. The petitioner received for its services only its actual overhead expenses. These facts were not disputed.

The Circuit Court of Appeals held that the officers and crew of the *Waukegan* were agents and employees of the Maritime Commission, but nevertheless held the petitioner liable for their negligence relying upon cases which hold an agent liable for his own torts or torts in which he participates. The Circuit Court of Appeals said:

> "* * * Appellant contends that the judgment against it was erroneous because the United States or the Maritime Commission is liable to appellee; it cites an opinion* to the effect that the United States is liable, by the Attorney General, in 1925, construing a form of contract used by the United States Shipping Board, which appellant asserts to be similar to that involved here. But, assuming that there is such a similarity and that either the United States or the Maritime Commission is liable to appellee, it does not follow that appellant is exculpated. That a principal is liable for a wrong does not necessarily immunize his agent. *Blumenthal* v. *United States,* 30 Fed. (2d) 247, 248, 249 (C. C. A. 2, 1929); *Sloan Shipyards* v. *U. S. Fleet Corp.,* 258 U. S. 549,

* 34 Op. Att'y Gen'l. 363.

567-568 (1922). The books are full of instances where dual liabilities are not alternatives or mutually exclusive; a plaintiff may be lucky enough to have a two-stringed bow. It is irrelevant, here, whether, at common law or by statute, appellee has a cause of action against the United States or the Commission. or whether appellant may be liable to the United States or the Commission for whatever amounts either of them may be obligated to pay appellee. Common sense and the precedents make appellant liable on the facts of this case. It had a most substantial measure of control over the operation of the vessel; it was paid to 'manage, operate and conduct the business of the line'. The reserved powers of the Owner could not possibly have been so burdensome as to deprive appellant of de facto control, and there is no showing that in fact the Owner did substitute itself as manager, either generally or at the time of this accident. Even if the Maritime Commission selected the officers, as appellant contends, appellant was not ousted of control. We think our opinion in *United States Shipping Board Emergency Fleet Corp.* v. *Greenwald,* 16 Fed. (2d) 948, which held a Managing Agent with similar powers liable for the death of a seaman, is applicable here, although in that case the Managing Agent had an interest in the profits. That the compensation appellant received from the Maritime Commission was relatively small is of no importance, for that was a matter of contract between it and the Commission, and cannot affect appellant's liability to third persons."

No claim was made in either Court that the petitioner was in any respect negligent or that it controlled or should have controlled the master either in the loading or in the navigating of the *Waukegan.*

Reasons for Granting the Petition.

The Circuit Court of Appeals has decided a question of the law of agency contrary to the decisions of this Court, contrary to an opinion of Attorney General Stone rendered in 1925 dealing with a similar situation, contrary to the universally established principles of the law of agency as set forth in treatises and decisions of the various courts. The decision affects the relationship between the Maritime Commission and all those operating vessels for its account at a time when that relationship is of the utmost importance. This decision will mean, if it remains unchallenged, that the managing agents are liable for all damages due to negligent navigation,—a liability they never contemplated and which was never before even considered in any reported decision.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

SOUTHGATE NELSON CORPORATION,
Petitioner.

By ARTHUR M. BOAL,
Counsel for Petitioner.

I HEREBY CERTIFY that I have examined the foregoing petition; that in my opinion it is well founded and entitled to the favorable consideration of this Honorable Court; and that it is not filed for the purpose of delay.

ARTHUR M. BOAL,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION.

Opinions.

The opinion of the District Court (R. 93) is reported in 36 Fed. Supp. 873, and that of the Circuit Court of Appeals (R. 112) in 121 Fed. (2d) 190.

Jurisdictions.

The jurisdiction of this Court is provided by Title 28, U. S. Code, Section 347(a).

Facts.

The facts are stated in the petition. We wish, however, to stress the following: (1) The petitioner received as its sole compensation its overhead expense; (2) it did not share in the profits or bear any of the losses resulting from the operation of the *Waukegan;* and (3) the vessel was operated for the account of the Maritime Commission (United States) by whom all of the operating expenses were paid, including the wages of the master, officers and crew. Petitioner was merely an intermediate agent and did not participate in any of the negligent acts resulting in the collision of that ship with the bridge.

Summary of Argument.

The Circuit Court of Appeals has held that an intermediate agent is liable for the tort of a subagent committed in the performance of its principal's work even if the principal is also liable. This proposition is contrary to the

decisions of this Court as set forth in *Johnson* v. *Fleet Corporation*, 280 U. S. 320, and *Standard Oil Co.* v. *Anderson*, 212 U. S. 215; is contrary to all the text writers on the subject of agency, the decisions of the various State courts and the Restatement of the Law of Agency; contrary to the opinion of Attorney General Stone rendered in 1925 (34 *Opinions of the Attorney General*, 363) dealing with a similar situation, and lacks the support of any authority.

ARGUMENT.

POINT I.

The decision of the Circuit Court of Appeals is in conflict with decisions of this Court.

The Circuit Court of Appeals held that even if the United States or the Maritime Commission as owner of the *Waukegan* were liable for the negligence of the master or crew, the petitioner was also liable. The Court said (R. 114):

> "* * * But, assuming that there is such a similarity and that either the United States or the Maritime Commission is liable to appellee, it does not follow that appellant is exculpated. That a principal is liable for a wrong does not necessarily immunize his agent. (Citations.) The books are full of instances where dual liabilities are not alternatives or mutually exclusive; a plaintiff may be lucky enough to have a two-stringed bow. It is irrelevant, here, whether, at common law or by statute, appellee has a cause of action against the United States or the Commission, or whether appellant may be liable to the United States or the Commission for whatever amounts either of them may be obligated to pay appellee. Common sense and the precedents make

> appellant liable on the facts of this case. * * * We think our opinion in *United States Shipping Board Emergency Corp.* v. *Greenwald,* 16 Fed. 2(d) 948, which held a Managing Agent with similar powers liable for the death of a seaman, is applicable here, although in that case the Managing Agent had an interest in the profits. * * *"

In the *Greenwald* case, referred to by the Circuit Court of Appeals, the Court said (951):

> "* * * Bull & Co. managed and operated the vessel on a 'cost plus' plan and received a percentage of the profits. It is conceded in the record that the decedent was employed by the Shipping Board and under these circumstances Bull & Co. are deemed owners *pro hac vice* with all liabilities ordinarily attaching against a true owner. * * *"

In basing its decision on the *Greenwald* case, the Circuit Court of Appeals is in conflict with its own decision in *The Elkton,* 86 Fed. (2d) 201. In the latter case a managing agent of Shipping Board vessels had successfully defended himself against suits growing out of the operation of such vessels and sued the United States for reimbursement for expenses so incurred. In holding the managing agent entitled to reimbursement under ordinary principles of agency, the Court said:

> "* * * We find it difficult to see how this contract can be construed as creating anything but a straight agency for operating the Board's ship. * * * It chose, not to charter its ships to the company, but to put them in trade on its own account; * * *"

In the *Greenwald* case the Court held that the managing agent was an owner *pro hac vice.* In the *Elkton* case the same Court, dealing with a similar contract, said the man-

aging agent was not an owner *pro hac vice* or an independent contractor but a mere agent. In this case the Court while holding the petitioner a mere agent, imposed upon it the liabilities of an owner *pro hac vice* or an independent contractor contrary to the decision in the *Elkton* case.

So far as the *Greenwald* case can be any support to the decision of the Circuit Court of Appeals, it was overruled by this Court in *Johnson* v. *Fleet Corporation,* 280 U. S. 320, 74 L. Ed. 451. The Court had before it then a group of cases arising out of the operation of ships by the United States through managing agents. A number of suits had been brought as this one was, at law against the Fleet Corporation and against the managing agents. They were all dismissed on the ground that there was a remedy against the United States for all the causes of action under the Suits in Admiralty Act (U. S. Code, Annot., Title 46, §748) and that remedy was exclusive of all others. This Court there stated:

> "The analysis of the act and the reasons on which rests our decision in United States Shipping Bd. Emergency Fleet Corp. *v.* Rosenberg Bros. & Co. apply here. Putting the United States and the Fleet Corporation on the same footing and providing remedies to be exclusive in admiralty would not serve substantially to establish uniformity if suits under the Tucker Act and in the court of claims be allowed against the United States and actions at law in state and federal courts be permitted against the Fleet Corporation or other agents for enforcement of the maritime causes of action covered by the act. Such a failure of purpose on the part of the Congress is not readily to be inferred. *We conclude that the remedies given by the act are exclusive in all cases where a libel might be filed under it.* * * *" (Italics ours.)

This Court clearly denied a right to recover both against the United States and the managing agent and decisively disposed of the *Greenwald* case as any authority for any such dual liability.

This Court also laid down in *Standard Oil Company* v. *Anderson,* 212 U. S. 215, the rule applicable to this situation. There the plaintiff, employed as a longshoreman, was injured through the negligent operation of a winch. All the work of loading was done by employees of the stevedore except the operation of the winch. That was done by a winchman in the general employ of the Standard Oil Company, the owner of the vessel. In determining the question of liability the Court first determined whether the winchman was the agent of the stevedore or of the shipowner and the determination of this question was decisive of the question of liability. Mr. Justice Moody said:

> "It sometimes happens that one wishes a certain work to be done for his benefit, and neither has persons in his employ who can do it nor is willing to take such persons into his general service. He may then enter into an agreement with another. If that other furnishes him with men to do the work, and places them under his exclusive control in the performance of it, those men become *pro hac vice* the servants of him to whom they are furnished. But, on the other hand, one may prefer to enter into an agreement with another that that other, for a consideration, shall himself perform the work through servants of his own selection, retaining the direction and control of them. In the first case, he to whom the workmen are furnished is responsible for their negligence in the conduct of the work, because the work is his work, and they are, for the time, his workmen. In the second case, he who agrees to furnish the completed work through servants over whom he retains control is responsible for their neg-

> ligence in the conduct of it, because, though it is done for the ultimate benefit of the other, it is still, in its doing, his own work."

The test there laid down by this Court is: Whose work is being done? In this case the work of operating the *Waukegan* was that of the Maritime Commission. Petitioner was not in any sense an independent contractor or an owner *pro hac vice*. The master and officers were selected and paid by the Maritime Commission and the vessel was operated for the account of the Commission. Petitioner as an intermediate agent with limited authority under the direction and control of the Maritime Commission should not be held liable for the negligence of the *Waukegan's* crew.

POINT II.

The decision of the Court of Appeals in this case is in direct conflict with universally established principles of the law of agency.

Both a principal and an agent are liable for the negligence of the agent, but it is the universal rule of local law that both cannot be liable on the doctrine of *respondeat superior* for negligence in which neither participated. If the so-called agent is really an independent contractor, he is liable; if merely an intermediate agent of the principal, he is not liable.

In Story on Agency, 9th Edition, Section 313, at pages 385-6, it is said:

> "But no action will ordinarily lie against an agent for the misfeasance or for the negligence of those whom he has retained for the service of his principal by his consent or authority, any more than

it will lie against a servant who hires laborers for his master at his request for their acts; unless indeed in either case, the particular acts which occasion the damage are done by the orders or directions of such servant or agent. The action under other circumstances must be brought either against the principal or against the immediate actors in the wrong."

In Tiffany on Agency, page 385, it is said:

"An agent is not as a rule liable to third persons for loss or injury caused by the wrongful act or omission of a subagent or coagent unless he authorized or participated therein."

Floyd R. Mechem, Law of Agency, Second Edition, in §332 (pp. 244-5-6) it is said:

"For the torts of such subagent to third persons the agent would not be liable merely by virtue of his relation but the principal would be liable as for the torts of any agent.

"Where the general manager and train despatcher properly employed a watchman to keep strikers from the right of way of a railway and the watchman in the course of his employment made an improper assault upon the plaintiff, it was held that the watchman and the railway company were liable to the plaintiff but that the general manager and train despatcher were not. (Citing Canfield *v.* C. R. I. & P. Ry. Co., 59 Mo. App. 354)."

In 3 Corpus Juris Secundum, at page 322, it is stated:

"An agent is not, in general, liable to third persons for the misfeasance or malfeasance of a subagent employed in the service of his principal, unless he is guilty of fraud or gross negligence in the appointment of such subagent or improperly cooperates in the latter's acts or omissions."

The decisions of the courts of the various States are all in accord that an intermediate agent is not liable for the torts of a person employed by him for its principal who at the time of committing the tort is doing the principal's work where there is no participation in the tort by the intermediate agent.

Bath v. *Caton,* 37 Mich. 199. This was an action for trespass upon land and cutting and removal of timber. The Sinclair Mining Company was engaged in mining operations and was cutting timber from its own land. This work was under the general supervision of Bath, who employed a surface captain and other workmen who worked under his general direction. He directed the surface captain to cut and get out wood and timber, meaning that it should be cut only from the Company's land, and believed the surface captain, who had been long in the employ of the Company, knew where the boundary line was. In carrying out these orders the surface captain and men working under him went across the boundary line and cut timber on Caton's land. The Court held that Bath could not be held liable for trespass under the doctrine of *respondeat superior,* saying (202):

> "* * * It is not enough in such a case that there exists the relation of superior and subordinate. There must be something more. The relation must be such that the subordinate is the servant or agent of the superior in the particular course of business or sphere of action in which the wrong is done. Such was not the case here. In short the requisite conditions to authorize the application of the doctrine of *respondeat superior* against Bath were not present. To apply it against him would imply that the company could not be held liable, a position which cannot be admitted."

Brown v. *Lent,* 20 Vermont 529, 533. One Barker contracted with the Vermont Central Railroad Company to do certain stone and masonry work and had acquired the right to quarry stone from a certain ledge. Barker employed the defendant as his general agent to superintend all the work under his contract. Defendant gave to one Morris, who had special charge of the blasting, general directions in respect to the work at that particular place. Morris gave directions relative to a blast by which plaintiff's daughter was injured. The Trial Court instructed the jury that if they believed the defendant was the general superintendent of the work under Barker and had the same power that Barker had to control and direct the manner in which the blasting was done, he would be liable. The Supreme Court in reversing said:

> "* * * neither principle nor authority will warrant the holding a mere middle man, an intermediate agent between the master and the direct agent, constructively responsible for the acts of the latter."

Smith v. *Rutledge,* 332 Illinois 150, 163 N. E. 544. The plaintiff recovered a judgment against one Rutledge ,the owner of an apartment building, and against the Illinois State Trust Company, the managing agent. A fire resulted from the negligence of the janitor in the operation of an oil burner. The burner was in charge of the janitor who had been hired by the owner, but who was paid by the Trust Company out of funds it collected. In holding the Trust Company not liable for the negligence of the janitor, the Court said:

> "* * * An agent is not, in general, liable to third persons for the misfeasance or malfeasance of subagents employed by him in the service of his principal unless he is guilty of fraud or gross negligence

in the appointment of such sub-agents or improperly cooperates in the latter's acts or omissions (2 *Corpus Juris*, p. 829). Neither is he liable for the negligence of other agents of his principal with which he had nothing to do."

Wahlheimer v. *Hardenbergh*, 217 N. Y. 264. An action for libel was brought against the General Manager and Secretary of the New York City News Association for libelous articles distributed by his subordinates in the association. The defendant did not participate in the distribution of the libelous matter. Judge Cardozo said (266):

> "The trial judge left it to the jury to say whether the defendant was the real principal in the business. If he was the principal, if the business, regardless of the name under which it was conducted, was in fact his, then, of course, the reporters were his servants, and he was responsible for the libel. But we find no evidence that he ever was the principal. He was not even a member of the association. He was employed by the executive committee; he was paid a salary for his services; and he held his position at the pleasure and subject to the direction of his employers. Undoubtedly, he had large duties of supervision and large powers of control. But the business was not his; the reporters were not his servants; he was not the principal, but the manager.
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> "We hold, then, that there is nothing in this record to justify the conclusion that the defendant was the principal. That, however, is the one theory on which the case went to the jury. But if other theories of liability were to be considered, they would be found to be equally untenable. On the subject it is impossible to add anything to what was so well said by Mr. Justice CLARKE in his dissenting opinion at the Appellate Division. The defendant, if he

was not the principal, cannot be held on the theory of respondeat superior."

The universality of the rule that an intermediate agent is not liable for the torts of a sub-agent in which he did not participate is shown in the American Law Institute's Restatement of the Law of Agency.

Section 79, Comment:

"a. Whether or not the agent is authorized to employ agents of the principal depends upon the manifestations of the principal in light of the circumstances, including the usages of the business and of the parties inter se. The agents so employed are the agents of the principal and not of the employing agent, who is not responsible to them for their compensation unless he so manifests, and is no more responsible for their conduct to third persons or to the principal than he is for the conduct of other agents of the principal, unless he is negligent in their selection. (See Secs. 358, 405)."

Section 344, Comment:

"a. The liability of the agent for conduct which he directs is the same as that of the principal, and the Comment on Sec. 212, dealing with the liability of the principal, applies. The agent is not liable for the tortious conduct of other persons in the principal's employ merely because they are subject to the agent's orders. (See Sec. 358) If, however, he directs them to act, intending an act or a consequence which would otherwise be tortious, the fact that his directions are those commanded by the principal does not give him immunity from liability."

"Illustrations:

"1. A, foreman of a gang of track workers, directs some of the workers to obtain wood from

a specified field which belongs to T. A is subject to liability to T for the trespass.

"2. Same facts as in Illustration 1, except that A tells the man to enter a field belonging to the railroad. By mistake they enter T's field. A is not thereby liable to the plaintiff."

"Section 358:

"(1) The agent of a disclosed or partially disclosed principal is not subject to liability for the conduct of other agents unless he assists them in the performance of a tortious act or directs or permits them to commit it."

"Illustration:

"1. A is employed by P as general manager. B, a servant under the immediate direction of A, is negligent in the management of a machine, thereby injurying T, a business visitor. A is not liable to T."

In the *West Hixton*, 1927 A. M. C. 1781, suit was brought against the managing agent for damages resulting from a collision due to the negligence of the master. The vessel was operated for the account of the United States under a managing agency agreement. The Court held:

"* * * On the 15th day of April, 1920, the plaintiff was the owner of a motorboat named *Thais*, which was moored at a wharf or dock known as the First Street dock, in and upon the waters of Los Angeles harbor. On the morning of that day appellant was operating and had the exclusive control and management of the freight steamer *West Hixton*, which was then being operated, managed, and directed by appellant, and was under the command of Lewis C. Drewson, captain of said vessel. The *West Hixton* was proceeding under the direct command of Drewson down channel to said First Street

wharf or dock under and by virtue of orders so to do issued to Captain Drewson by the port captain of appellant. Drewson was employed as captain of said vessel by appellant, and his salary as such captain was paid by appellant. But in its operation of the *West Hixton*, and in its employment of Drewson, appellant claims that it was acting only as agent of the owner, out of whose funds Drewson's wages were paid."

and at 1785:

"• • • We are of the opinion that, in employing Drewson, appellant was acting solely as agent of the owner of the ship, and that Drewson was the employee of the owner and not of the agent. Conceding that, as respondent contends, the employee was under the control and subject to the orders of appellant, yet that control was merely control by the principal through the agent. The negligence did not occur by reason of appellant's direction to Drewson to move the ship to a certain place. It was negligence by the captain, consisting of carelessness in his manner of operation of the ship while executing the order. Under these circumstances the negligence must be attributed, not to the agent who gave the order under which the ship was being moved, but to the owner whose employee was guilty of that negligence."

POINT III.

The decision of the Circuit Court of Appeals is contrary to the decision of Attorney General Stone rendered in 1925.

Attorney General Stone rendered an opinion in 1925 (34 Opinions of the Attorney General 363) on the relationship between the managing agent, the master and crew and

the United States Shipping Board in cases of vessels operated under agreements similar to that here involved. Attorney General Stone quotes the General Counsel of the Shipping Board as stating:

> "'Our view has always been that the masters and crews of Shipping Board vessels are agents and servants of the United States. The vessels are owned by the Government. The Fleet Corporation acting as agent for the United States appoints the managing agents, who in turn select the crew. They do so subject to the rules and regulations issued by the owner. The masters and crews become the agents and servants of the owner, the United States, and not of the intermediary agents, the Fleet Corporation and the managing agents. The latter do only what they are authorized and directed to do in employing the masters and crews.'"

and then he goes on to state:

> "The present form of contract, as a whole, makes clear the relation of principal and agent between the United States and the agent, with only limited authority in the agent. It is in no sense a charter or a lease of the vessels. The agent cannot be held as an insurer of the safety of the men employed for the account of the United States unless the principle of the Compensation Law is to be ignored and its remedial purpose defeated."

The Attorney General there was determining that the managing agent was not liable for injuries suffered by members of the crews of vessels operated under the agreements therein described and that the United States was. There is no indication or intimation in his opinion that there was a dual liability, because he stated:

> "• • • The agent cannot be held as insurer of the safety of the men employed for the account of the United States.• • • "

This opinion of the Attorney General has been relied upon by those who dealt with the Shipping Board and the Maritime Commission in making contracts as constituting the principle of law to be applied to their construction and to the determination of the relationship between the parties. The Circuit Court of Appeal's decision is contrary to that opinion and will disturb the relationship between the United States and the operators of its merchant ships.

If a managing agent is liable for damages caused by the negligence of a master of a government owned vessel, it would be liable in all collision cases where the master or other officers of the vessel were negligent. In all the cases involving such collisions litigated in every maritime circuit there is not one which has held the managing agent liable.

In *The Suwied* (*N. Y. & Cuba Mail S. S. Co.* v. *United States*), 12 Fed. (2d) 348, Judge Hough stated:

> "It has not been claimed by the United States, and is vehemently denied by the Steamship Company, that this agency agreement makes it responsible for the careless navigation of navigators by it selected, and it is indeed a serious matter to hold responsible for the navigation of a vessel the agent who procured the navigators. • • • "

While we have not actual cases where the liability of the managing agent for the negligence of the master has been considered, it has been involved in collision cases on innumerable occasions. The fact that it has not been determined is a clear indication that the parties were all of the opinion that there was no such liability, relying upon well-established principles of agency. This universal principle

of agency established by the State courts and as set forth by text writers is set aside and ignored by the decision of the Circuit Court of Appeals.

POINT IV.

Conclusion.

It is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

ARTHUR M. BOAL,
Counsel for Petitioner.

No 672

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

SOUTHGATE NELSON CORPORATION,
Petitioner,

against

ELIZABETH J. QUINN,
Respondent.

MEMORANDUM OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

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SOUTHGATE NELSON CORPORATION,

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against

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MEMORANDUM OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

Statement of the Case.

Pursuant to a declared public policy to establish a merchant marine; to develop its foreign and domestic commerce, and to provide vessels as naval auxiliaries in times of war or national emergency, the United States acquired title to certain steamships and Congress created The Maritime Commission as its agency for the establishment and continuance of trade routes, and for the charter, sale or operation of the vessels, as the case may be.

46 U. S. C. A., Sec. 1101, et sequi.

In order to keep the established lines in uninterrupted operation, pending satisfactory sale or private charter, the Maritime Commission contracted with the Southgate Nelson

Corporation to temporarily operate certain vessels on designated routes. The contract so entered into was called "Temporary Operating Agreement 1937" and expired, by its terms, in December, 1937 (R., 10).

This agreement was subsequently thrice extended, finally to March 31, 1939 (R., 79).

Among the ships operated was the "Waukegan" and on January 9, 1939 she sailed from Philadelphia bound for Baltimore via the Chesapeake and Delaware Canal.

She was so improperly loaded at Philadelphia that she was "down by the head". This caused her to get out of control and refuse to respond to her helm.

In entering the canal she sheered from right bank to left, and back again. As she approached the draw-bridge at St. Georges, Delaware, she went out of control, crashed into the bridge structure, demolished it, and killed Robert Quinn and William Oakes, the two bridgetenders.

Mrs. Quinn sued the Southgate Nelson Corporation, a private corporation of Virginia, which had the custody and control of the vessel, and which was operating it, under contract, as a private operator, as an independent contractor and actual manager of the fleet.

A jury having been waived, the trial judge found that the defendant sued was an independent contractor or agent who assumed the obligation to, and actually did, man, equip, supply and operate the vessel, and, therefore, was personally responsible for the negligence of its servants, and awarded the plaintiff damages in the sum of $20,000.00.

On appeal by defendant the findings of law and fact by the lower court were sustained and the judgment affirmed.

> Quinn v. Southgate Nelson Corp., 121 Fed. (2d) 190.

The defendant, now petitioner herein, seeks a review by this court.

The petition for certiorari, and the supporting brief (Summary of Argument, p. 7 and Point II, p. 12), are

inexcusably misleading, and is not a fair presentation of the facts.

From a reading of said petition and brief one would think that the Temporary Operating Agreement was one of the old Shipping Board agreements, commonly called the M.O.3 and the M.O.4 forms. All citations are in respect of those old contracts.

Such is not the case, and the decisions and opinions interpreting those old forms have absolutely no pertinency. Those old agreements were with so-called Managing Agents. They were strictly sub-agency contracts.

Those agreements were variously construed and interpreted by different courts, and by different Assistant Attorneys General of the United States. Some held that seamen, serving on Fleet Corporation vessels, were employees of the Managing Agent and not employees of the Fleet Corporation or of the United States; others held that such seamen were employees of the United States.

Under the name of Harry M. Daugherty, Attorney General, March 11, 1924 (34 Opin. 120), an opinion was rendered by some Assistant Attorney-General to the effect that such seamen were employees of the Managing Agent and not of the owner, the United States.

In the name of Harlan S. Stone, Attorney General, January 17, 1925 (34 Opin. 363), a diametrically contrary opinion was rendered, doubtless by some Assistant Attorney-General. We are confident that the Chief Justice will not own that 1925 opinion as his brain-child.

Those opinions were rendered in an attempt to settle the question whether such seamen came under the Federal Employees' Compensation Act or whether they could sue the Managing Agent at common law.

Thereafter the Suits in Admiralty Act was enacted, and this provided the exclusive remedy for seamen on government owned vessels.

Fleet Corporation v. Lustgarten, 280 U. S. 320.

That decision settled the matter and on September 10, 1930 the Comptroller-General of the United States, after reviewing the two opinions from the Attorneys-General, advised the United States Compensation Commission that seamen on vessels of the Fleet Corporation, operated by Managing Agents, were not employees of the United States and therefore not entitled to compensation.

> "While the Attorney-General (Stone) held that seamen of such vessels were employees of the United States within the meaning of the Employees' Compensation Act, his opinion was rendered at a time before judicial determination had so firmly established the relationship between the Merchant Fleet Corporation and the members of the crews of its vessels as being substantially the same as that existing between any private shipping corporations and the crews of their vessels, under Merchant Marine Act and the Suits in Admiralty Act."
>
> Opinion of the Comptroller-General, No. A-31684.

The "judicial determination" to which the Comptroller-General referred was the decision by this court in the Sloan Shipyards case, 258 U. S. 549, at page 567.

The Present Relationship Is Statutory.

However, all questions as to the relationship between Southgate Nelson Corporation, a private corporation of Virginia, and The Maritime Commission, and the character of the operating agreement between them, have been settled by the statute under which the Maritime Commission came into being.

46 U. S. C. A., Sec. 1101, et sequi.

That statute directed that the temporary operation of the vessels shall be by *a private operator.*

> "All vessels now being operated by private operators *shall be* temporarily operated by the Commission for its account *by private operators,* and upon such operating agreements as the Commission may deem advantageous." (Italics supplied.)
>
> 46 U. S. C. A., Sec. 1194.

Acting under the mandate of that section, the Commission formulated an agreement with Southgate Nelson Corporation. That agreement was significantly called an Operating Agreement, and this corporation was designated as the Managing Agent (R., 10). It was to manage the operations.

That agreement made the Southgate Nelson Corporation an independent contractor for it obligated it to,

a. "undertake the management and operation of the Line" (R., 11, fol. 33).

b. "manage, operate and conduct the business of the Line" (R., 12, fol. 34).

c. The vessels were allocated to the Managing Agent "for management and operation under this agreement" (R., 12, fol. 36).

d. To "manage and operate said vessels" on the named routes (R., 13, fol. 37).

e. To make certain, specific minimum sailings (R., 13, fol. 39).

f. It "shall manage and operate said vessels" exclusively under specified trade names (R., 13, fol. 39).

g. It "agrees to man, equip, victual, supply and operate the vessels" (R., 14, fols. 42-43).

h. Agrees "to a strict compliance with the minimum manning scales and minimum wage scales" (R., 15, fol. 45).

i. To exercise due diligence (R., 15, fol. 44).

j. To procure protection and indemnity insurance (R., 18, fol. 53).

This insurance was actually procured, and the Southgate Nelson Corporation as well as the Maritime Commission, were named as the insured (R., 216).

We pause here to inquire,

If the Southgate Nelson Corporation had no personal or direct liability for its own negligence, why insist that it carry liability insurance?

If the officers and crews were not regarded and considered as employees of Southgate Nelson Corporation, why procure a liability insurance policy to cover personal injury and death arising from its negligence?

The policy protects the Southgate Nelson Corporation against,

> "(1) Liability for life, salvage, and/or loss of life of, or personal injury to, or illness of, any person, excluding however . . . liability to an employee (other than a seaman) of the assured. . . ."

That clause definitely indemnifies this petitioner, and the insurance company will have to pay this judgment for the death of a non-employee. No payment will have to be made by the Maritime Commission or by the United States.

On each occasion when the agreement was extended there was a stipulation that the Southgate Nelson Corporation's original surety bond for $60,000.00 to secure faithful performance of the contract, be kept in force (R., 77-80-84). Why require a substantial bond if Southgate Nelson was a mere intermediate or subordinate agent?

Yet, notwithstanding all this clear evidence of being an independent contractor, the petitioner would seriously urge that the Southgate Nelson Corporation was a mere intermediate agent of the Maritime Commission, and that the ship's officers were only lesser employees, sub-agents, for whose negligence the Southgate Nelson Corporation would not be liable!

The petitioner is neither frank nor fair in trying to hoodwink this court with old Fleet Corporation agreements and obsolete opinions and decisions which have no relevancy here, because the Southgate Nelson Corporation was expressly made a private operator by statute. That is its inescapable category and not even the frequent waving of an old opinion, allegedly rendered by former Attorney-General, now Chief Justice, Stone, can change that category.

Despite the statute which says that, absent sale or charter, the vessels "shall be temporarily operated * * * by private operators" (46 U. S. C. A., Sec. 1194); despite the executive and managerial capacity exercised by Southgate Nelson Corporation, under the operating agreement; despite the contractual obligation to actually man the vessels; to pay minimum wages; to make minimum sailings; to provide insurance against personal injury or death, and, despite the decisions of this court which hold that an agent of the government may be held liable for its own torts, this petitioner has the temerity to picture this Virginia corporation as an "intermediate agent" between the Maritime Commission and the ship's officers, and therefore no liability attaches against the Southgate Nelson Corporation.

The fact is, and the District Court and the Circuit Court have so held, that the Southgate Nelson Corporation was an independent contractor; that it acted as a free agent in the operation of the vessels; that it exercised direct control over their operation, and that it was a responsible, individual and independent agency, holding a commanding

position over the vessels, and directly and personally liable for its own tortious conduct.

Petitioner would have this court believe that this corporation was an impotent, subordinate, subservient employee, shorn of all right and power of an executive or of a managerial nature.

It is preposterous.

The Theory of Liability.

Mrs. Quinn, the widow, sued at common law on the theory that the Southgate Nelson Corporation, as operating and managing agent of the vessel, was personally liable, as an independent agent, for its own negligence.

This theory was sustained by both the trial and appellate courts by virtue of the decisions of this court, which held that an agent was personally liable for its own torts, notwithstanding its principal might also be liable. There is a direct remedy against the agent which did the wrongful act.

> "The plaintiffs are not suing the United States but the Fleet Corporation, and if its act was unlawful, even if they might have sued the United States, they are not cut off from a remedy against the agent that did the wrongful act. In general the United States cannot be sued for a tort, but its immunity does not extend to those who acted in its name."
>
> Sloan Shipyards v. Emergency Fleet Corporation, 258 U. S. 549, at pages 567 and 568.

See also:

Keifer & Keifer v. Reconstruction Finance Corp., 306 U. S. 381;

United States Shipping Board v. Harwood, 281 U. S. 519;

Reconstruction Finance Corp. v. Menihan, 312 U. S. 81.

Since this was not a maritime tort, the Suits in Admiralty Act had no application. Quinn and Oakes were shore workers, not members of the crew. Theirs was a common law cause of action under the state law of Delaware, the *locus deliciti.*

Mrs. Oakes, the other widow, tried to sue the United States in admiralty, but Mr. Boal, attorney for petitioner herein, acting then as attorney for the insurance company which issued the liability policy covering this accident, succeeded in dismissing the libel.

Oakes v. United States, et al., 35 Fed. Supp. 868.

Consequently, decisions like Johnson v. Fleet Corporation, 280 U. S. 320, relied on by petitioner, have no application or relevancy to this common law action.

Nor can petitioner, by persistently repeating the baseless assertion that the ship's personnel were "sub-agents," doing the work for the Maritime Commission, and were not the responsible employees of Southgate Nelson, make it so.

Nor can petitioner get much comfort from the case of *Standard Oil Co.* v. *Anderson,* 112 U. S. 215. That case is favorable to respondent for it established the rule that mere payment of wages does not determine whose servant a workman is, but the test is, who controlled his activities.

Even had the Maritime Commission paid the salaries of the ship's officers, yet, if Southgate Nelson Corporation retained the right to give them orders and to direct their activities, they were employees of Southgate Nelson Corporation.

The Del Norte, 119 Fed. 118;
Hahlo v. Benedict, 216 Fed. 303 (2).

Under the contract the duty to man the vessels, operate them, solicit and carry the freight, was exclusively upon the Southgate Nelson Corporation which was a private,

domestic corporation, chartered in Virginia and the capital of which was provided by private individuals. It was not created by Act of Congress to carry out any governmental enterprise; it was not quasi-governmental like the Fleet Corporation; its funds did not come from the public treasury, and the judgment will be paid by the insurance company, or the Southgate Nelson Corporation, and not by the federal treasury.

Therefore, when it retained and exercised control over the actions and movements of the vessels and their personnel, the ship's officers were servants and employees of the Managing Operator, and not of the Maritime Commission, even if it paid their salaries. The duty of selecting the officers was upon the Southgate Nelson Corporation (R., 15, top).

> Linstead v. Chesapeake & Ohio, 276 U. S. 28;
> Denton v. Yazoo R. R. Co., 284 U. S. 305.

Hence the contention that Southgate Nelson Corporation was a mere "intermediate agent", and that the ship's officers were merely "sub-agents" of the Maritime Commission, must yield to the decisions of this court.

We therefore ignore the cases cited in the petition with regard to subordinate servants, intermediate agents and sub-agents. The premise of intermediate agent having fallen, the argument based thereon must fall.

Petition for Certiorari Is Without Merit.

The collision with the bridge occurred in Delaware. The death of Quinn was due to common law negligence. No federal statute or law is involved. The right to recover is governed by the laws of Delaware. Even the interpretation of the operating agreement is a matter of state law.

There is no conflict between the decision of the Second Circuit and that of another circuit. There is no conflict between the Second Circuit and the decisions of this court as claimed by petitioner (Point I) but on the contrary the decision of the Circuit Court is in harmony with the Sloan Shipyard case, 258 U. S. 549; the Harwood case, 281 U. S. 519, and the Keifer case, 306 U. S. 381.

Suppose, for the purpose of the argument, that the Circuit Court gave a wrong precedent, to wit, the Greenwald case, 16 Fed. (2d) 948, for its right decision, nevertheless, if the decision was right the mere fact that a wrong reason was given would not justify overruling it.

Helvering v. Gowran, 302 U. S. 238.

The decision of the Circuit Court of Appeals is claimed (Point III) to be contrary to the alleged opinion of Attorney-General Stone in 1925! We never knew that the interdepartmental advisory opinion of Attorneys-General had the dignity and standing of a judicial precedent.

It is further claimed that said Opinion "has been relied upon by those who dealt with the Shipping Board and the Maritime Commission in making contracts, as constituting the principle of law to be applied to their construction and to the determination of the relationship between the parties" (Petition, p. 21).

Why should they do so careless a thing? Why should they follow a 1925 advisory opinion, without the force of law, and one which had been discredited by the Comptroller-General, when the present relationship, and the terms, conditions and provisions governing same, are prescribed clearly by the 1936 federal statute?

The Southgate Nelson Corporation did not follow the 1925 Opinion. The contract expressly refers to the sections of the 1936 Act which controlled the arrangements (R., 11).

It is also claimed that since the Circuit Court's decision is contrary to that opinion, the Quinn decision will disturb

the relationship between the United States and the operators of its merchant ships!

How could that 1925 opinion, based on old Shipping Board agreements, mislead or influence shipowners or operators who take their law and authority from the Act of 1936, which created the Maritime Commission?

That opinion was merely advisory. It was not a judicial determination. It was overruled by the Comptroller-General, and its theory was repudiated by this Court in the Sloan Shipyard case.

But suppose the shipowners and operators did blindly follow that opinion, would that require that this court review and overrule a correct decision by the United States Circuit Court of Appeals?

The shipowners and operators were certainly remiss if they did not consult alert attorneys and thereby learn that the opinion, issued in the name of the then Attorney-General, but doubtless prepared by some Assistant Attorney-General, had long since been overruled by the Comptroller-General, whose findings do have the force of a law in governmental departments.

Even before that (1920) this court had defined the law in respect to employees of the Fleet Corporation, and held that they were not agents of the United States but employees of the operator.

United States v. Strang, 254 U. S. 491.

The Decision of the Circuit Court Is In Accord With Recognized Legal Principles.

The petitioner, under Point II, cites text writers and cases on the proposition that an intermediate agent is not liable for the torts of a sub-agent of the principal.

Of course there is no factual basis for the hypothesis.

As between the Southgate Nelson Corporation and the ship's officers, the corporation was a principal. It was in the same category as an owner *pro hac vice.*

The Santa Cruz, 1938 A. M. C 1505.

The relationship of master and servant obtained between the Southgate Nelson Corporation and the ship's officers, notwithstanding the Maritime Commission reserved supervision over the selection of the officered personnel, and may have paid their salaries.

Metropolitan S. S. Co. v. Pacific-Alaska Co., 260 Fed. 973;
The Charlotte, 285 Fed. 84;
The Bombay, 38 Fed. 512;
Florida Grain v. Shipping Board, 300 Fed., page 172;
Noce v. Morgan Co., 106 Fed. (2d) 746 (6).

The Southgate Nelson Corporation, by statute, and under the terms of the agreement, was an independent contractor and agent, directly liable for the torts of its own employees.

Sloan Shipyards v. Emergency Fleet Corporation, 258 U. S., at pages 567, 568;
Blumenthal v. United States, 30 Fed. (2d) 247, 248;
Pennell v. Home Owners Loan, 21 Fed. Supp. 497;
The Louise Rugge, 239 Fed. 458;
Wyllis v. Palmer, 137 N. Y. 248.

Such is the rule in Delaware:

Phila. Storage Battery Co. v. Radio Corp., 194 Atl. 414 (18).

And the same rule exists in New York:

Rhynders v. Greene, 255 App. Div. 401 (2).

The question sought to be raised falls of its own inherent weakness.

Petitioner charges (Point I) that the Circuit Court was inconsistent in holding Southgate Nelson Corporation to have been an independent agent, personally liable for the torts of its employees, because it held, in the Elkton case, 86 Fed. (2d) 201, that, under the Shipping Board agency agreements, the operating company was a mere sub-agent of the Shipping Board.

The Elkton decision merely interpreted the particular contract involved in that case. The Admiral Line was appointed "General Freight Agents" for Atlantic, Gulf & Oriental Steamship Co. The Admiral Line agreed to have sub-agents at all ports where it did not have offices of its own. Certain cargo owners sued the Admiral Line, which defended, and the court held that it could recover those litigation expenses because the contract between the two steamship companies created a straight agency and the United States, as principal, had to pay.

Petitioner overlooked the Circuit Court's decision in the McCory Bros. case, that where the agreement created the relationship of *independent contractor*, that such independent contractor was individually liable for its own torts, and had to pay its own litigation expenses.

McCory Bros. v. United States, 51 Fed. (2d) 1010, at page 1013.

That view is in harmony with an earlier decision by the same court.

U. S. Shipping Board v. Greenwald, 16 Fed. (2d) 948.

The Circuit Court of Appeals followed this court's decisions in the three cases hereinbefore cited, as well as its own precedents.

The petition presents no facts or circumstances which would justify the grant of the writ.

An Error Corrected.

At the bottom of page 5 of the petition it is stated that "no claim was made in either court that the petitioner was in any respect negligent, or that it controlled or should have controlled the master, either in the loading or in the navigating of the Waukegan".

The attention of the court is invited to pages 49 and 50 of the transcript of record whereat plaintiff's counsel definitely claimed improper trim of the boat upon sailing due to negligence of ship's officers in so distributing the load as to make the vessel "down-by-the-head."

On the trial of the case the plaintiff definitely placed the responsibility for the stowage of the cargo upon the ship's officers.

> "Q. Who, on behalf of the Southgate Nelson Corporation, overlooked or supervised the loading of cargo?
>
> A. The ship's officers.
>
> Q. The ship's officers, and that also included the stowage of the cargo aboard the ship?
>
> A. Yes, sir" (Testimony of Gray, R., fol. 129).

The captain and mates were negligent; the port captain was negligent. These were all servants of Southgate Nelson Corporation, and for whose negligence the principal was liable.

The District Court and the Circuit Court made concurrent findings of fact that the defendant was negligent

in sending the vessel on a voyage when so improperly loaded that she could not be safely navigated.

This court will accept such concurrent findings as conclusive on the fact issue.

> Virginia Ry. v. System Federation, 300 U. S. 515 (1).

CONCLUSION.

The petitioner cannot be serious in asking the writ of certiorari to review a decision which is so patently right, and so in conformity with numerous adjudication of this court.

Astute counsel cannot be sincere in contending that, under the Maritime Commission Act, and the plain language of the Operating Agreement, the Southgate Nelson Corporation—a private, domestic corporation, acting solely for itself—was a mere intermediate agent of the Maritime Commission, and that the ships' officers were merely subagents.

Nor can able counsel really believe that an old opinion, even if it had been written by the present Chief Justice, could still be regarded as so sacrosanct as to prevail against a repudiation by the Comptroller-General, and a contrary adjudication by this court.

The litigation certainly should have stopped after the decision by the Circuit Court of Appeals. No federal law was involved. No federal question was in the case. The decision was sound and supported by the authority of United States Supreme Court decisions. Why further attempt to review?

The African in the woodpile is not hard to discover. His name is Bridge Damage Claim.

That explains the unmeritorious points urged in the petition. It is delay, delay, delay which the petitioner wants. It is but an effort to postpone and hinder Mrs. Quinn in

collecting her judgment, because thereby also would be postponed the day of reckoning when the government's half-million dollar bridge damage claim will have to be dealt with.

That is the only other outstanding claim.

To accomplish delay the petitioner waited until October 9th before serving respondent with the petition, although it had been filed in this court on October 1st, 1941. That was 83 days from entry of the judgment by the Circuit Court of Appeals.

Petitioner was quite willing to let interest on the judgment accumulate just to gain delay, indifferent both to the widow's rights and the expense of this brief.

It is suggested that for such stubbornly litigious and deliberately dilatory tactics, a penalty, under Rule 30 (2) of this court, should be imposed upon petitioner.

The petition itself is "so unsubstantial as to be frivolous", and to require not only denial but the imposition of a deterring penalty.

Slaker v. O'Connor, 278 U. S., at page 190;
Wagner Electric v. Lyndon, 262 U. S., at page 233;
Deming v. Carlisle Packing Co., 226 U. S., at page 106.

Respectfully submitted,

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Attorney for Respondent.

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CHARLES ELMORE CROPLEY
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vs.

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Respondent.

REPLY BRIEF FOR PETITIONER TO RESPONDENT'S BRIEF OPPOSING PETITION.

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The question here involved is one of the local law of agency and the decision of the Circuit Court of Appeals is in conflict with all the other decisions on the point 5

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REPLY BRIEF FOR PETITIONER TO RESPONDENT'S BRIEF OPPOSING PETITION.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Southgate Nelson Corporation respectfully submits the following comments in reply to the respondent's brief:

Respondent seeks to sustain the decision of the Circuit Court of Appeals by contending that the petitioner was an independent contractor or an owner *pro hac vice*, as shown by the following statements (p. 7):

> "Yet, notwithstanding all this clear evidence of being an independent contractor, the petitioner would seriously urge that the Southgate Nelson Corporation was a mere intermediate agent of the Maritime Commission, and that the ship's officers were only lesser employees, sub-agents, for whose negligence the Southgate Nelson Corporation would not be liable."

(p. 9):

> "Even had the Maritime Commission paid the salaries of the ship's officers, yet, if Southgate Nelson Corporation retained the right to give them orders and to direct their activities, they were employees of Southgate Nelson Corporation."

(p. 13):

> "As between the Southgate Nelson Corporation and the ship's officers, the corporation was a principal. It was in the same category as an owner *pro hac vice.*
>
> • • • • • •
>
> "The Southgate Nelson Corporation, by statute, and under the terms of the agreement, was an independent contractor and agent, directly liable for the torts of its own employees."

Respondent disposes of the cases construing similar managing agency contracts by saying that those agreements were with the Shipping Board, this one is with the Maritime Commission and that this is a temporary agreement (p. 3):

> "From a reading of said petition and brief one would think that the Temporary Operating Agreement was one of the old Shipping Board agreements, commonly called the M. O. 3 and the M. O. 4 forms. All citations are in respect of those old contracts.
>
> "Such is not the case, and the decisions and opinions interpreting those old forms have absolutely no pertinency. Those old agreements were with so-called Managing Agents. They were strictly sub-agency contracts."

The Elkton, 86 Fed. (2d) 201, is specifically disposed of by stating (p. 14):

> "The Elkton decision merely interpreted the particular contract involved in that case."

Yet Judge Learned Hand described the contract in that case as follows:

> "* * * The Shipping Board appointed the company 'its Agent to manage, operate and conduct the business of such vessel as it * * * may assign to the Agent,' and the company agreed to act as such 'in accordance with the directions' of the Board. The company was to 'man, equip, victual and supply' the vessels as the Board required, and to pay all expenses and maintain them in seaworthy condition, all on the Board's account. It was to issue all documents on the Board's form, appoint sub-agents, collect freights which it must deposit in a bank approved by the Board and in the Board's name, and for which it was to account on forms prescribed by the Board. For this the company was to be paid in percentages on the gross receipts including salvage; out of these it was to bear its 'administrative and general expenses of every nature,' not including brokerage however, or commissions 'for agency services rendered at foreign ports.' * * *."

The agreement in this case between the petitioner and the Maritime Commission provided (R. 14-15):

> "The Managing Agent agrees to man, equip, victual, supply and operate the vessels, subject to such restrictions and in such manner as the Owner may prescribe, and to certify or approve for payment by the Owner the true cost thereof and all other costs and expenses, except overhead, incident to the management, operation and conduct of business of the vessels as the Owner may from time to time direct. The Licensed Officers and Chief Steward, however, are to be subject to the approval of the Owner, and the Owner shall have the right to require the removal of any of such employees if it shall have reason to be dissatisfied."

In the case of the *Waukegan* the owner paid directly all operating expenses. In *The Elkton* the managing agent paid them and then was reimbursed by the owner. The petitioner had less control over the *Waukegan* than the managing agent involved in the *Elkton* case had over that vessel. The *Waukegan* agreement was just as clearly one of agency as was the *Elkton*.

The business being conducted was the Maritime Commission's business and the losses and profits were those of the Maritime Commission. Petitioner merely received its own overhead expenses for its services and was not in any sense either an independent contractor or an owner *pro hac vice*.

Respondent recognizes that unless petitioner was an independent contractor on principles of agency it should not be held liable (p. 10):

> "We therefore ignore the cases cited in the petition with regard to subordinate servants, intermediate agents and subagents. The premise of intermediate agent having fallen, the argument based thereon must fall."

The Circuit Court of Appeals did not find, as claimed by the respondent, that the petitioner was an owner *pro hac vice* or an independent contractor, but held that even though the Maritime Commission was the principal, the petitioner was liable because it exercised some supervision or control over the officers and crew of the *Waukegan*, although it was not claimed that they directed or participated in any of the acts of negligence involved. The Court stated (R. 113):

> "* * * Appellant contends that the judgment against it was erroneous because the United States or the Maritime Commission is liable to appellee; it

> cites an opinion to the effect that the United States is liable, by the Attorney General, in 1925, construing a form of contract used by the United States Shipping Board, which appellant asserts to be similar to that involved here. But, assuming that there is such a similarity and that either the United States or the Maritime Commission is liable to appellee, it does not follow that appellant is exculpated. That a principal is liable for a wrong does not necessarily immunize his agent. (Citations) The books are full of instances where dual liabilities are not alternatives or mutually exclusive; a plaintiff may be lucky enough to have a two-stringed bow. * * *"

This reasoning of the Court the respondent makes no attempt to support or justify.

The question here involved is one of the local law of agency and the decision of the Circuit Court of Appeals is in conflict with all the other decisions on the point.

Respondent states (bottom of p. 10):

> "* * * Even the interpretation of the operating agreement is a matter of state law."

With this we are in accord, but we are not here dealing with any question of negligence of the managing agent except by virtue of the doctrine of *respondeat superior*, and the doctrine of *respondeat superior* cannot apply unless the petitioner was either an independent contractor or an owner *pro hac vice*. All the decisions in the State courts which we have been able to find and all the opinions of the text writers are to the effect that a managing agent is not liable for the torts of sub-agents employed by him in his

principal's business and with his principal's authority. These authorities are recited in the petitioner's main brief. Respondent has cited no cases to the contrary.

The decision of the Circuit Court of Appeals on this important point of the law of agency will cause great confusion not only in contracts between the Government and private operators in the operation of government owned merchant vessels, but in all fields of agency unless it is corrected by this Court.

It is respectfully submitted that the writ should be granted.

Respectfully submitted,

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